United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2153 76-2168

To be Argued By
Ralph McMurry

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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KHALIEB McKINNON, et al, :

Plaintiffs-Appellants, :

-against- :

J.W. PATTERSON, et al, :

Defendants-Appellees. :

----------X

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P/S

BRIEF FOR DEFENDANTS-APPELLEES

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Preliminary Statement

This is a cross-appeal by plaintiffs-appellants (hereafter "plaintiffs") from a judgment of the United States District Court of the Southern District of New York, Stewart, J., dated October 12, 1976, insofar as the judgment denied plaintiffs monetary damages and insofar as the judgment declined to expunge disciplinary reports from plaintiffs' records.

Questions Presented

1. Whether the District Court properly denied monetary damages to plaintiffs?

2. Whether the District Court properly declined to expunge disciplinary reports from plaintiffs' records?

Facts

The facts of this case are fully set forth in the defendants' brief dated January 12, 1977, and filed in support of the defendants' appeal. This Court is respectfully referred to this brief for a full statement of the facts.

Insofar as plaintiffs on this cross-appeal seek damages from defendants, the personal involvement, if any, of defendants in the alleged deprivation of plaintiffs' constitutional rights becomes critical. Unfortunately, plaintiffs blithely skip over this requirement. In addition, the "good faith" of defendants in doing what they did is also very much at issue on the damages question.

Accordingly, the facts regarding "personal involvement" and "good faith" are set forth below. Fortunately the record in this case is substantial on these points since every defendant against whom damages were sought, from the Commissioner of

Corrections on down, appeared to testify in his own behalf. As background to this discussion it is first important to note that defendants' evidence established that Eastern was in a state of unrest in the spring and summer of 1973. This resulted from an intake into a new medium security facility of inmates from maximum security facilities as well as a delay in getting some programs started. Most of the inmates coming into Eastern, which was one of New York's only medium security facilities at the time, came from maximum security facilities and were unable to adapt to the medium security setting. McClay, 339-340; Preiser, 280, 281, 290, 302, 303; Patterson, 313, 314; Perrin, 237.

A. Defendant Perrin

Joseph Perrin, then Deputy Superintendent at Eastern, testified that he was never on the adjustment committee at Eastern (253, 260), and did not supervise the committee (253). Perrin testified that in the course of his duties he would not receive or examine the individual Adjustment Committee reports and reappearance reports; only a calendar of all the findings in a particular day (207, 208, 211).

Perrin testified he had no personal knowledge whether the inmates in the laundry incident ever got their review (211). He testified that the failure of any plaintiff to receive a review never came to his attention (252). He stated that if it ever came to his attention that required reviews had not been held, he would have investigated the matter (212-214). The lack of such a review would not come to his attention in the ordinary course of business (212, 213, 252).

The evidence shows that at least several inmates involved in the laundry incident who received seven days keeplock with review got reappearance reviews. (Perrin, 256; Plaintiffs' exhibits 25, 36.) As to the remainder, including plaintiffs, the documentary record is silent. Perrin testified that it was possible that some inmates were given reappearance interviews but that for some reason or another the reappearance form was not prepared or kept (258).

There is some evidence that some inmates but not others in the laundry episode who had been keeplocked were soon thereafter released after interviews (155-159, 174), apparently without seeing the Adjustment

Committee. Perrin suggested that some of the inmates may have been selected for such interviews on the possibility that they may have participated in the sit-down as a result of peer pressure (267). However, Perrin did not actually know who conducted these interviews or the actual basis for their selection (268).

With respect to transfers, Perrin testified that final decision making power to make a transfer rested in the Division of Classification and Movement in the Department of Correction in Albany, New York. Perrin, 229.

Perrin also testified that on the basis of an examination of Plaintiffs' exhibits 13, 15, and 20 (transfer recommendations) and State's exhibits C, E, and F (reports by correction officials concerning laundry incident), he was of the opinion that plaintiffs were transferred because of their inability to function in the Eastern medium security setting (243-246). He specified that refusal by plaintiffs to perform assignments or follow the rules demonstrated an inability to function in a medium security facility (231-232). He stated that he had not seen a transfer done for disciplinary reasons because there

are other aspects to transfers (230-231). He stated that he personally had nothing to do with the transfers of plaintiffs (251).

B. Defendant Patterson

J.W. Patterson, then Superintendent at Eastern, testified that he was not in direct supervision of the Adjustment Committee (330). He testified that he did not look at Adjustment Committee reports as a matter of course (331). Many inmates often appeared before the Committee on any given day (328). Patterson would only receive summaries or calendar lists of a day's dispositions (328). The responsibility for conducting a review would rest with the individual in charge of the Adjustment Committee at the time of the review (329).

With respect to transfers, Patterson indicated that the final decision making power to make a transfer rested in the Division of Classification and Movement in the Department of Correction in Albany, New York. Patterson, 319, 320. Patterson testified further that he signed the recommendations for transfer for plaintiffs (316). Patterson also testified that he

had no reason to believe the information contained in the program recommendations were inaccurate (318, 319). Patterson necessarily relied on judgment of, and information received from, subordinates (321).

Based on an examination of plaintiffs' transfer recommendations (Plaintiffs' exhibits 13, 15, 20) and several of the reports prepared by correction personnel on the laundry incident, Patterson could understand how the Program Committee could think that plaintiffs could not function in a medium security facility and required more structure (321, 322).

Patterson noted that in any given week he might sign 25 or 30 transfer recommendations (316), and that initiation of the transfer request could come from various sources (316, 317).

With respect to the problem of transfers, Patterson testified that it was of paramount importance "to protect the weak from the strong and the strong from their own weaknesses" (322). He referred to this problem elsewhere as one of "peer pressure" (328). He testified that the majority must be protected, and a minority of inmates could not be allowed to disrupt

the program of the majority. In such cases the minority must be removed. This he considered good administrative practice (322).

C. Defendant McClay

Then Deputy Superintendent of Program Services McClay testified that recommendations for transfers were part of his overall responsibility (337). To the best of his recollection, he participated in the preparation of the plaintiffs' transfer recommendations (338). The recommendations were based on an evaluation of all the information in the inmates' folder (338).

McClay testified that at this time many inmates were being considered for transfers, not just inmates involved in the laundry incident (339). This was due to the transition phase which Eastern was going through at that time as a result of the changeover from city to state prisoners (339). He testified that many of the men coming into Eastern from maximum security facilities did not in fact meet the criteria for medium security type offenders (340). Several incidents at the prison helped officials come to this conclusion (340, 341). Many of these men were being considered

for transfer (340).

D. Defendant Preiser

Peter Preiser, then Commissioner of Corrections, said it was his opinion that on June 5, 1973, no hearing was required before a transfer to another facility. If such a rule existed or came into existence, notice would have been received from the Correction administration in Albany.* No such advice was ever reported. Preiser noted that the issue was then still in litigation in the United States Supreme Court. Preiser, 288, 306.

Preiser testified further that in June, 1973, transfers were an established method of disposing of incidents in institutions (291). Problem inmates in one institution would require a period adjustment before rising to the surface to cause problems in their new institution (303). Preiser also testified that his philosophy of transfers changed over time (302). He came to believe that transfer of an inmate to a more secure facility could often have a counterproductive

* McClay (343-344); Perrin (250-251); and Patterson (320-321) were of the same opinion - that in June, 1973, no hearing was required before a transfer.

effect on the inmate's plateau of adjustment thus far achieved (302). However, Preiser noted that at the time Eastern was opened the Department had only one medium security facility and that the Department was used to working on an overall maximum security basis.

Defendant Preiser very infrequently ordered specific inmates transferred (282). He testified unequivocally that he did not routinely receive transfer requests at any time (285). He has no recollection of plaintiffs' transfer recommendations ever crossing his desk (286). He testified that the Department transferred more than 5,000 inmates per year (285). Preiser as Commissioner found it necessary to delegate many functions, among which were the transfer functions (282). It was never Preiser's opinion that a transfer was a disciplinary matter; rather he has always considered it a program adjustment matter (298, 299). While Preiser remebers "somebody mentioning to me that there was a work stoppage in the laundry [at Eastern]," that is all he remembers (289). He does not recall specifically whether he was told about the Eastern transfers (293). Preiser said the incident at Eastern was nothing

unusual (290).

Preiser testified he oversaw 23 institutions, 14,000 to 16,000 inmates and 10,000 employees (279, 292, 293).

POINT I

THE DISTRICT COURT CORRECTLY DENIED PLAINTIFFS MONETARY DAMAGES.

Plaintiffs argue that the District Court erred in declining to award them monetary damages. This argument is totally devoid of merit.

A. Adjustment Committee Hearings

Plaintiffs' first argument is that defendants owe plaintiffs damages because of the "inadequate" adjustment committee hearings afforded them. As the defendants noted in their first brief (at pp. 14-29), the plaintiffs' adjustment committee hearings comported with due process and the District Court's conclusion to the contrary was erroneous. A fortiori plaintiffs are not entitled to damages.

Assuming arguendo plaintiffs' adjustment

committee hearings were constitutionally inadequate for the reasons stated by the District Court,* plaintiffs are not entitled to damages because (1) they do not have the sufficient prerequisite of personal involvement; and (2) they acted in good faith.

Strict personal involvement in the deprivation of constitutional rights is required before liability can be imposed under the civil rights law. This has long been true in this Circuit and remains settled law today. MukMuk v. Commissioner, 529 F. 2d 272, 275 (2d Cir., 1976), cert. den. ___ U.S. ___ (1976); Johnson v. Glick, 481 F. 2d 1028, 1033-34 (2d Cir.), cert. den. 414 U.S. 1033 (1973). Plaintiffs conveniently ignore this prerequisite to § 1983 liability.

* The District Court's conclusion that the adjustment committee hearings were not impartial because Lt. Demskie was "involved" in the laundry incident is clearly erroneous. Even the District Court admitted in its opinion that Lt. Demskie was outside the laundry room. (Opinion 15). Correction Officer Barthel, who was present in the laundry room the entire morning, said Lt. Demskie was never present in the laundry room that day (159, 163). Sgt. Brock places Lt. Demskie outside the laundry room (358). While Lt. Demskie may have discussed the incident with other employees, his actual "involvement" thus appears to be zero. It is interesting to note that plaintiffs never bothered to call Lt. Demskie as a witness although they now find him to be a key cornerstone of their case.

There is no sufficient "personal involvement" here by any of the defendants. See pp. 3-11, supra. Perrin testified that he had nothing to do with adjustment committee proceedings here. McClay and Patterson were not involved in the adjustment committee proceedings. Preiser is even more remote in space and time; he was not at all personally involved in the laundry affair.

None of the leading "personal involvement" cases support the proposition that any purported personal involvement here was sufficient to subject defendants to § 1983 liability and damages.

In Martinez v. Mancusi, 443 F. 2d 921 (2d Cir., 1970), cert. den. 401 U.S. 983, the Court found that a cause of action was stated against a warden who was alleged to have personally been aware of, and indifferent to, plaintiff's delicate medical requirements.

In Wright v. McMann, 460 F. 2d 126, 135 (2d Cir., 1972), a predicate for § 1983 liability against a warden was found where state law charged the warden with specific responsibility for strip

cells and evidence at trial showed the warden had actual knowledge of the conditions of the cell.

In U.S. ex rel. Larkins v. Oswald, 510 F. 2d 583 (2d Cir., 1975), a statutory reporting requirement was held on the facts of that case to meet the "personal responsibility" requirement with respect to the Commissioner. It should be noted that part of the decision turned on the fact that the defendants had not (inexplicably) asserted various defenses or denied personal knowledge.

In Sostre v. McGinnis, 442 F. 2d 178 (2d Cir., 1971), cert. den. 404 U.S. 1049 (1972), the Commissioner was not held liable where there was no evidence he knew of the warden's improper motives. It was the warden's improper motives which formed the basis of the damage claim against him.

What emerges from these cases is the need of a highly specific link between a defendant and an alleged wrong. These links consist of personal knowledge, bad faith and direct responsibility. Those links simply do not exist here. There is no evidence that any defendant directly participated in wrongdoing

or had any knowledge of wrongdoing, or had any reason to suspect wrongdoing, or had any bad motive, or had the direct responsibility necessary to impose liability.

Plaintiffs apparently would have the defendants saddled with liability in the theory that the defendants were in high positions of authority and responsibility. However it is clear that the doctrine of respondeat superior does not apply in civil rights actions. Johnson v. Glick, 481 F. 2d 1028, 1034 (2d Cir.), cert. den. 414 U.S. 1033 (1973).

Assuming arguendo defendants were "personally involved" in the alleged deprivations of plaintiffs' constitutional rights, plaintiffs are nonetheless not entitled to damages from defendants since defendants acted in good faith. The good faith defense was pleaded and proved at trial.

The Adjustment Committee proceedings in this case followed the procedures set forth in 7 N.Y.C.R.R. 250 et seq. There is no evidence that the defendants had any reason to believe the procedures were for any reason constitutionally inadequate. No court decision existed in 1973 which stated that the Adjustment

Committee procedure was inadequate. Indeed, no court decision exists today - other than that on this appeal - holding the Adjustment Committee procedure insufficient with respect to limited keeplocks such as occurred in this case. No provision of the regulations prohibited a person "involved" in an incident from sitting on the committee. There was no evidence at trial that any proceeding was not conducted fairly or that any disposition was not rendered on the merits.

Defendants are entitled to rely on existing law in the operation of prison disciplinary procedures. This is a classic example of the wisdom of the Supreme Court's ruling that officials should not be charged with knowledge of the future course of constitutional law. Pierson v. Ray, 386 U.S. 547, 557 (1967).

In cases where damages have been sought for allegedly unconstitutional procedures consummated at a time when the law on the subject was in doubt, the courts have denied relief. A leading case directly applicable to the case at bar is Ault v. Holmes, 369 F. Supp. 288 (D.C. Ky., 1973), affd. and modified 506 F. 2d 288 (6th Cir., 1974). There the Court found plaintiff's transfer to be unconstitutional because

of certain alleged procedural deficiencies. The plaintiff sought both compensatory and punitive damages. The court held that no compensatory or punitive damages could be awarded where the question of the unconstitutionality of such transfers was very much in doubt at the time. The court noted that if no compensatory damages could be awarded, if followed that no punitive damages could be awarded. The result in Ault followed a finding that the transfer was unconstitutional; a fortiori no claim for compensatory or punitive damages will lie in the case at bar where the lawfulness of the Adjustment Committee procedure was not even in doubt at the time.

Similarly, in United States ex rel. Jones v. Rundle, 358 F. Supp. 939 (E.D. Pa., 1973), the court held in a prisoner's civil rights action that no damages should be awarded even though a breach of constitutional law was shown, inasmuch as the law was "very unsettled" in the field at the time of the constitutional violations.* See also Preston v. Cowan, 360 F. Supp. 14 (D.C. Ky., 1973) (damages not

* The Court engaged in a lengthy discussion on the question of retroactivity and damages at pp. 949-952.

recoverable from warden for refusing to mail prisoner's letter where belief in refusing to mail such letters under existing state of the law was reasonable); Lucia v. Duggan, 303 F. Supp. 112 (D.C. Mass., 1969) (punitive damages not recoverable where officials relied for actions on state statute). See generally Cipriano v. City of Houna, 395 U.S. 701, 706 (1969); Claybrone v. Thompson, 368 F. Supp. 324, 327 (M.D. Ala., 1973); Collins v. Sullivan, 392 F. Supp. 621 (D.C. Ala., 1975).

The Supreme Court's recent decision in Wood v. Strickland, 420 U.S. 308 (1975), clearly supports defendants' position in the case at bar. In Wood, several expelled students sued school board members pursuant to 42 U.S.C. § 1983 for punitive and compensatory damages. The Court was faced with the question of immunity for school board officials. The Court found that the appropriate standard to be applied was necessarily both subjective and objective. The Court found that improper motive or disregard as to clearly established constitutional rights form the basis of pecuniary award. Here, however, the constitutional rights now claimed by plaintiffs were hardly "clearly

established" in 1973; on the contrary, it was "clearly established" that plaintiffs did not have those rights. Thus defendants could not know or could not reasonably have been expected to know that their actions might affect a constitutional right of plaintiff herein; and hence a fortiori defendants could not have had a malicious intent to deprive plaintiff of a constitutional right. Wood v. Strickland, at 322.

In a recent decision of the Seventh Circuit, the Court ruled that prison officials had reasonably relied on standards existing at the time of the practices challenged and accordingly could not be said to have disregarded plaintiffs' established constitutional rights. Knell v. Bensinger, 522 F. 2d 720 (7th Cir., 1975). The Court applied the two prong "subjective" and "objective" tests of Wood v. Strickland to the prison context, and found good faith under both standards.

The "clearly established rights" requirement is law in this Circuit. In Burnham v. Oswald, 333 F. Supp. 1128, 1131 (W.D.N.Y., 1971), the Court said:

"A disagreement among reason-

> able men does not, however, necessarily rise to the level of a violation of constitutional rights. Before a federal court can act under the Civil Rights Act, there must be a clear violation of the constitutional rights of the party seeking relief. Although there is no doubt that in recent years the federal courts have subjected the administration of prisons to increased scrutiny, a federal court will not substitute its own judgment about what restrictions are required for the safety and security of the institution for that of the prison administrator unless a violation of constitutional rights is clear." (Emphasis added)

The "clearly established rights" doctrine has recently received specific approval from this Court. In MukMuk, supra, the Court stated (at 277-278):

> "While there are instances of abuse so shocking to the conscience as to require no judicial pronouncement for their general recognition, (citation omitted) there are other types of deprivation of rights which may be recognized as unconstitutional for § 1983 purposes only when they are judicially so declared."

The Court then went on to quote the "clearly

established constitutional rights" requirement set forth in Wood v. Strickland, supra.

This is clearly a case of rights becoming evident only when "judicially so declared." It is impossible under any view of the facts to hold that plaintiffs were deprived of clearly established constitutional rights, since the rights they assert were not "clearly established" on June 5, 1973. Indeed, the only "clearly established" rights belonging to plaintiffs in 1973 were notice of the charges against them and an opportunity to explain their version of events. Sostre, supra. This is exactly what plaintiffs received. To argue that defendants must pay damages because three years later a federal court decided that the procedures in effect were not constitutionally sufficient is surely wrong.

B. Failure to Obtain a Review

Plaintiffs allege they are entitled to damages because they did not obtain a "review" of their keeplock status after seven days. This argument is devoid of merit.

As the District Court noted, the requirement

of a review after seven days was not mandatory under the State's regulations. Opinion, 22. Significantly the Adjustment Committee could have imposed two weeks keeplock on plaintiff without any intermediary review. N.Y.C.R.R. 252.5(e)(2). There was even valid existing legal authority in 1973 that holding the courts in this Circuit would not interfere in prison disciplinary procedures where keeplock less than 15 days was imposed. Sczerbaty v. Oswald, 341 F. Supp. 571 (S.D.N.Y., 1972). Thus it is difficult to see how the failure to obtain a review after seven days adds up to a loss of federally protected rights extant in 1973.

Assuming arguendo plaintiffs were entitled to a mandatory review under State regulations, it does not follow that plaintiffs' constitutional rights were violated. Not every violation of state law is equivalent to the loss of federal rights, a fact often forgotten today. See United States ex rel. Chiarello v. Mancusi, 288 F. Supp. 178 (S.D.N.Y., 1968); United States ex rel. Lloyd v. LaVallee, 304 F. Supp. 957 (S.D.N.Y., 1969); Tyrrell v. Taylor,

394 F. Supp. 9, 17 (E.D. Pa., 1975). Whether a violation of state law also violates a federally protected right turn on the circumstances of the case. In this case it is clear that under law applicable in 1973 keeplock for up to two weeks was not a "substantial" loss in a constitutional sense. The failure to obtain a review after seven days thus cannot be said to be a loss of constitutional proportions.

Assuming arguendo plaintiffs' constitutional rights were violated by the failure to obtain a review, plaintiffs are nonetheless not entitled to damages from defendants. Defendants were not personally involved in the deprivations and defendants acted in good faith. See pp. 3-11, supra. Of particular note is (a) Perrin's estimony that the failure of any plaintiff to receive a review never came to his attention and that had it done so he would have investigated the matter (212-214, 252); and (b) Patterson's testimony that the responsibility for the review rested with the individual* in charge of the Adjustment Committee.

* This individual was not a defendant in this action.

C. Transfers

Plaintiffs claim (Br. 27) that the District Court's finding that "the evidence does not establish that the adjustment committee was directly responsible for the transfers or that it did recommend changes in programs for the plaintiffs" was clearly erroneous. This argument is without merit.

The record (A 114, 115, 116) shows that the Adjustment Committee's disposition did not include a recommendation for a program change. Moreover, there was no evidence that the adjustment committee caused the tranfers; plaintiffs' argument is a non-sequitur one based on the mere fact that the transfers followed the adjustment committee hearings. Such an argument also assumes that the incident leading up to plaintiffs' appearance before the Committee is of no significance. Plaintiffs finally (and quite erroneously) appear to assume that the alleged fact the adjustment committee hearings were "inadequate" means that these hearings somehow caused the transfers. This too is a complete non-sequitur.

The truth is that plaintiffs' transfers were

caused, not by the Adjustment Committee, but by plaintiffs own inability to function in a medium security setting. Plaintiffs' participation in the "sit-in" which resulted in their appearance before the Committee was a symptom of this fact.

The transfers in this case cannot be viewed in isolation. Defendants' evidence at trial showed that the transfers of inmates in the laundry incident were part and parcel of a larger general policy of transferring out of many inmates at that time who were not adjusting to the Eastern medium security setting. This included many inmates not involved in the laundry incident. Eastern at that time had recently opened as one of New York's only medium security facilities and had a relatively small population capacity. Many of the inmates who first came there came from maximum security facilities were not adjusting to Eastern's medium security setting. The officials at the institution were desirous of maintaining stability at their institution and "protecting the weak from the strong," and protecting the majority from disruptions of a minority. Transfers were an accepted management tool at the time and used

as a way of responding to "incidents." One such incident was the laundry affair. This involved not one inmate, but thirty to forty. The dynamics of a situation involving one person are obviously of a different order of magnitude than a situation involving dozens of inmates. Even so, plaintiffs were not treated as mere numbers. Their transfer evaluations were based on factors unique to them as individuals, including but not limited to the laundry incident. The record is clear that the three plaintiffs in this case were transferred for a valid management purpose - plaintiffs inability to function in a medium security facility - rather than any supposed impermissible reason involving the adjustment committee.

Under all these circumstances, it can hardly be said that the District Court's findings on the transfers were clearly erroneous.

POINT II

THE DISTRICT COURT CORRECTLY DECLINED TO ORDER PLAINTIFFS' DISCIPLINARY RECORDS EXPUNGED.

Plaintiffs' argument that the disciplinary reports should have been expunged is without merit.

Plaintiffs' argument assumes what is in issue, namely that the adjustment committee hearings were inadequate. As defendants have pointed out in their first brief, this proposition has no merit. A fortiori the disciplinary reports are a proper part of plaintiffs' records.

Assuming arguendo the adjustment committee hearings were somehow inadequate, the records should not have been expunged. As the District Court noted, plaintiffs unquestionably participated in the laundry dispute. The evidence is overwhelming that none of the plaintiffs did any work in the laundry room despite orders to return to work (e.g. 103, 138, 139, 164, 309).* There is no credible claim that the

* A rule in the prison required orders to be obeyed and complaints, if any, made afterwards. Perrin, 249; State's exhibit H, rule 4.

findings of the Adjustment Committee were inaccurate, or that the alleged deficiencies in the hearings somehow caused inaccurate findings.

Under the circumstances plaintiffs' complaint that they were punished for "mere presence" in the laundry room rings hollow, and there is no reason to expunge from the record a report whose truth is unquestioned.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT MUST BE AFFIRMED INSOFAR AS IT DENIED PLAINTIFFS RELIEF.

Dated: New York, New York
February 14, 1977

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
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Ralph McMurry, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for defendants-appellees herein. On the 14th day of February, 1977, he served the annexed upon the following named person :

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Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by them for that purpose.

Ralph J. McMurry

Sworn to before me this
14th day of February, 1977

Joan P. Scannell
Assistant Attorney General
of the State of New York